Supreme Court, U.S.
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No. 95-880

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ZACHARY TATUM, STRATA EXPLORATION, INC., TATUM PETROLEUM OHIO, INC. and TATUM PETROLEUM CORPORATION

Petitioners,

vs.

COLUMBIA NATURAL RESOURCES, INC. and STOCKER & SITLER OIL COMPANY,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' first two Questions Presented have been reduced to one question. It has been altered to state the facts described in the Amended Complaint.

I. Whether the "pattern of racketeering activity" element in the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1962(c), is unconstitutionally void for vagueness because it failed to notify Petitioners of potential RICO liability while they were committing hundreds of counts of mail fraud, 28 counts of wire fraud and one instance of Travel Act fraud to perpetrate multiple schemes over a period of twelve years.

Petitioners' Third Question Presented is not appropriate for their Application for Certiorari because it was neither argued nor ruled upon in either the district or circuit courts.

LIST OF PARTIES

The parties to the proceedings are:

Petitioners: Zachary Tatum, Strata Exploration, Inc., Tatum Petroleum Ohio, Inc. and Tatum Petroleum Corporation

Respondents: Columbia Natural Resources, Inc. and Stocker & Sitler Oil Company

Respondents represent that Stocker & Sitler Oil Company has no parent companies or nonwholly owned subsidiaries to list for purposes of Supreme Court Rule 29.6.

Respondents also represent that Columbia Natural Resources, Inc. is a wholly owned subsidiary of The Columbia Gas System, Inc. of Wilmington, Delaware. It has no nonwholly owned subsidiaries to list for purposes of Supreme Court Rule 29.6.

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No. 95-880

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ZACHARY TATUM, STRATA EXPLORATION, INC., TATUM PETROLEUM OHIO, INC. and TATUM PETROLEUM CORPORATION

Petitioners,

vs.

COLUMBIA NATURAL RESOURCES, INC. and STOCKER & SITLER OIL COMPANY,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, Columbia Natural Resources, Inc. and Stocker & Sitler Oil Company, respectfully request that the Court deny the Petition for a Writ of Certiorari submitted by Petitioners.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept Petitioners' Opinions Below, Statement of Jurisdiction, and Constitutional and Statutory Provisions Involved.

STATEMENT OF THE CASE

A. Procedural History

Petitioners' statement of the procedural history is substantially accurate with one exception. The Amended Complaint does allege that Petitioners conspired to violate 18 U.S.C. § 1962(c). (Amended Complaint, p. 74 ¶ 361.)

B. Course of Proceedings

Petitioners' statement of the course of the proceedings is accurate. It truthfully portrays that the issue in Petitioners' Third Question Presented was not raised or considered in the lower courts. It is new to this appeal.

C. Statement of Facts

For purposes of the Rule 12(b)(6) Motion to Dismiss granted by the trial court, the allegations of the Amended Complaint must be taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957). Therefore, the facts in this case are those set forth in the Amended Complaint.

As described in the Amended Complaint, Petitioners formed an association in fact enterprise which engaged in a pattern of racketeering activity by committing hundreds of related predicate acts continuously from 1981 to June 30, 1993, when the Amended Complaint was filed. The predicate acts consist of hundreds of instances of mail fraud, 28 instances of wire fraud and one instance of Travel Act Fraud. All are related to the theft of the Respondents' oil and gas leases, royalties and production income through various schemes. The Petitioners continue to receive oil and gas royalty and production income which should belong to the Respondents. This will persist through the productive lives of the oil and gas wells on the leases Petitioners stole through fraud and deception.

A series of Farmout Agreements gave Petitioners the opportunity to drill shallow oil and gas wells and earn shallow lease rights on 47 oil and gas leases belonging to the Respondents' predecessor. The lease rights to deeper horizons remained with Respondents' predecessor. These Farmout Agreements included an express promise that any new leases extending, renewing or replacing the original leases would belong to Respondents' predecessor and its successors. The Petitioners embarked on a furtive and intricate scheme to escape the fiduciary duties imposed by this clause in order to steal ten million dollars ($10,000,000.00) worth of oil and gas lease rights, royalties and production income belonging to Respondents.

On ten of the 47 oil and gas leases, the Petitioners obtained new oil and gas leases from the landowners that became effective if Petitioners failed to drill before

Respondents' oil and gas leases expired.[1] Of course, Petitioners validated their "top leases" by refraining from drilling until Respondents' leases expired. On four of these "top leases," Petitioners then drilled shallow wells. Instead of honoring the renewal, replacement and extension clause in the Farmout Agreements, Petitioners defrauded Respondents of both the royalties for the shallow wells and the right to drill deep wells.

When oil and gas exploration developments in the late 1980s made the deep drilling rights on these "top leases" valuable, the Petitioners drilled deep wells and thereby defrauded Respondents of substantial oil and gas production income.

In addition, when deep drilling became profitable, Petitioners took "top leases" on leases held by production from shallow wells Petitioners had drilled pursuant to the Farmout Agreements. Respondents' predecessor had retained the deep rights on these leases and later transferred them to Respondents. Once Petitioners had these "top leases," they plugged and abandoned their shallow wells that maintained the validity of these leases. This simple

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[1] Oil and gas leases generally, and these leases in particular, have a primary term for a set period, and a secondary term that lasts so long as oil and gas is produced. Therefore, a failure to drill within the primary term causes an oil and gas lease to expire. In this case, the primary term for most of the leases was 10 years, not the 20 years stated in Petitioners' Brief.

A new lease on real property already encumbered with a lease is called a "top lease." The "renewal, replacement and extension" clause in the Farmout Agreements is designed to prevent a farmee from using a "top lease" to "wash out" the interest of the farmor.

expedient caused Respondents' lease rights to expire. Then Petitioners used their "top leases" to drill new deep wells without honoring their renewal, replacement and extension clause obligations. The result was theft of valuable oil and gas production.

In order to perpetrate this thievery and delay its detection, Petitioners made false and misleading statements through interstate mails, wires and travel. Exhibits 24 to 30 to the Amended Complaint detail hundreds of mailings, 28 telephone calls and one act of interstate travel to promote Petitioners' fraudulent schemes.[2]

Now the Petitioners claim their theft of ten million dollars ($10,000,000.00) was just "ordinary business" so they could not know they might run afoul of the RICO law.

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[2] Amended Complaint, pp. 65-69, ¶¶ 332 to 344.

REASONS FOR DENIAL OF THE WRIT

SUMMARY OF ARGUMENT

There is no need to grant the Writ. Ten circuits agree; the "RICO pattern requirement" amply warns the wary. It consistently passes due process muster. No circuit believes it to be void for vagueness.

Since *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 256 (1989), the lower courts have applied the "RICO pattern requirement" to hundreds of factual configurations. In most cases, whether a "pattern" exists is not a difficult question. When different considerations point to conflicting conclusions regarding the existence of a "pattern," the lower courts balance the elements to reach consistent results. This is called the "multifactor" approach.

The wary can avoid RICO liability. Before the "pattern requirement" is satisfied, three thresholds must be crossed. First is one racketeering crime. Second is a second racketeering crime within ten years. Third is enough related and continuous crimes to be a "pattern of racketeering activity." Petitioners only challenge the clarity of the third threshold.

Petitioners do not claim the mail, wire and Travel Act fraud statutes are vague. Therefore, the first two thresholds are "bright line" warnings to the wary. When Petitioners committed their first racketeering crime, they knew this was the realm of the criminal. When they

committed their second racketeering crime within ten years, they knew this was the realm of potential RICO liability.

Petitioners should have known they were engaged in criminal activity every time they used the mails, the wires or the instrumentalities of interstate commerce to further their scheme to steal Respondents' property. When they committed hundreds of such violations during more than twelve years, they should have had little doubt they were establishing a pattern of racketeering activity in violation of RICO. Petitioners' only complaint is that they do not know precisely when their criminality crossed the third threshold and became a "pattern."

The "pattern requirement" provides a standard with at least as much clarity as many other tests this Court has approved like "restraint of trade," "an active part in management of political campaigns," "conduct unbecoming an officer and a gentleman," and "crimes against nature."[3]

Petitioners' third argument is new to this appeal. It was not argued or ruled upon in either the district or circuit courts. This alone suffices to deny review.

Further, Petitioners' third argument, although unclear, seems to be one that ignores logic and precedent. Even if adequately preserved below, it is not appropriate for review.

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[3] *See* footnotes 29 to 32, *infra* p. 26.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I.

PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

Petitioners have established no basis for review by this Court. There is an adequate body of law on the due process requirement of clarity in the law.[4]

There is no conflict in the circuits. Ten circuits have considered whether the RICO "pattern" requirement is vague. All ten have found it to be understandable and in compliance with due process requirements.[5] Likewise, all

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[4] *See, e.g., Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

[5] *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995); *U.S. v. Oreto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1161 (1995); *U.S. v. Korando*, 29 F.3d 1114 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 496 (1994); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995); *U.S. v. Bennett*, 984 F.2d 597, 606 (4th Cir. 1993), *cert. denied*, 113 S.Ct. 2428 (1993); *U.S. v. Ashman*, 979 F.2d 469 (7th Cir. 1992); *U.S. v. Dischner*, 974 F.2d 1502 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1290 (1993); *U.S. v. Sanders*, 962 F.2d 660 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 262 (1992); *Abell v. Potomac Ins. Co.*, 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992); *U.S. v. Van Dorn*, 925 F.2d 1331, 1334

the district courts to consider the intelligibility of the RICO "pattern" requirement have found it to be constitutional,[6]

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n.2 (11th Cir. 1991); *U.S. v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991), *cert. denied*, 500 U.S. 919 (1991); *U.S. v. Coiro*, 922 F.2d 1008 (2nd Cir. 1991), *cert. denied*, 501 U.S. 1217 (1991); *U.S. v. Woods*, 915 F.2d 854 (3rd Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *U.S. v. Pungitore*, 910 F.2d 1084 (3rd Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); *U.S. v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990), *cert. denied*, 498 U.S. 845 (1990); *U.S. v. Tripp*, 782 F.2d 38 (6th Cir. 1986), *cert. denied*, 475 U.S. 1128 (1986); *U.S. v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 993 (1979); *U.S. v. Parness*, 503 F.2d 430 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[6] *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995); *Bseirani v. Mahshie*, 881 F. Supp. 778 (N.D.N.Y. 1995); *U.S. v. Wei*, 862 F. Supp. 1129 (S.D.N.Y. 1994); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105 (S.D.N.Y. 1993); *American Credit Indem. Co. v. Legge*, 829 F. Supp. 649 (S.D.N.Y. 1993); *Corporacion Insular De Seguros v. Munoz*, 826 F. Supp. 599 (D.P.R. 1993); *Bingham v. Zolt*, 823 F. Supp. 1126 (S.D.N.Y. 1993); *U.S. v. Crosby*, 789 F. Supp. 440 (D.D.C. 1992), *aff'd*, 20 F.3d 480, *cert. denied*, 115 S.Ct. 221 (1994); *Schrag v. Dinges*, 788 F. Supp. 1543 (D. Kan. 1992); *Patrick Carter Assoc., Inc. v. Rent Stabilization Ass'n*, 781 F. Supp. 207 (S.D.N.Y. 1991); *U.S. v. Eisenberg*, 773 F. Supp. 662 (D.N.J. 1991); *U.S. v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990); *Farberware, Inc. v. Groben*, 764 F. Supp. 296 (S.D.N.Y. 1991); *U.S. v. Quintanilla*, 760 F. Supp. 687 (N.D. Ill. 1991), *aff'd*, 2 F.3d 1469 (7th Cir. 1993); *U.S. v. Lobue*, 751 F. Supp. 748 (N.D. Ill. 1990); *U.S. v. Andrews*, 749 F. Supp. 1520 (N.D. Ill. 1990); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F. Supp. 869 (N.D. Ill. 1990); *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850 (E.D.N.Y. 1990); *U.S. v. Gatto*, 746 F. Supp. 432 (D.N.J. 1990); *Norstar Bank v. Pepitone*, 742 F. Supp. 1209 (E.D.N.Y. 1990); *U.S. v. Busacca*, 739 F. Supp. 370 (N.D. Ohio 1990), *aff'd*, 936 F.2d 232 (6th Cir. 1991), *cert. denied*, 502 U.S. 985 (1991); *U.S. v. Paccione*, 738 F. Supp. 691 (S.D.N.Y. 1990); *U.S. v. Gigante*, 737 F. Supp. 292 (D.N.J. 1990); *Beck v. Edward D. Jones & Co.*, 735 F. Supp. 903 (C.D. Ill 1990); *U.S. v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665

save in this case and two other cases in the Southern District of Ohio.[7]

There was a conflict in the circuits regarding the proper interpretation of the RICO "pattern" requirement when this Court last considered RICO in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Some circuits, like the eighth circuit's *H.J.* decision,[8] believed there was a need for at least two different schemes to meet the pattern requirement.[9] Other circuits adopted a "multifactor" approach. This Court rejected the two schemes requirement. It interpreted "pattern" to require predicate acts which are: 1) related to each other; and 2) continue or threaten to continue for a significant period of time.

This Court, however, did not seek to define a RICO pattern with mathematical certainty. Instead, it chose to await further developments in the lower courts. Justice Brennan wrote:

F.2d 616 (5th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982); *U.S. v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2nd Cir. 1978); and *U.S. v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *cert. denied*, 429 U.S. 819 (1976).

[7] *Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990), *aff'd on other grounds*, 976 F.2d 279 (6th Cir. 1992) and *Kenty v. Bank One, Columbus, N.A.*, 1992 U.S. Dist. LEXIS 16645 (S.D. Ohio 1992).

[8] *H.J. Inc. v. Nortwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 485 U.S. 958 (1988).

[9] *See also, Flip Mortgage Corp. v. McElhone*, 841 F.2d 531 (4th Cir. 1988).

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

Id., 492 U.S. at 243.

This approach has proved to be wise. The lower courts have used the guidance provided by *H.J. Inc.* to focus on a "multifactor" approach to determine whether a RICO pattern exists. This change was summarized by an article in the Columbia Law Review:

> In the wake of *Sedima*, the federal courts set out to develop "a meaningful concept" of pattern with little guidance from the Court beyond the terms "continuity" and "relationship." Some courts read too much or too little into the terms. But, since the Court's more explicit guidance in *H.J. Inc.*, developments in pattern jurisprudence in the various circuits are converging. Courts are breaking down the two-pronged analysis - "continuity plus relationship" - into a flexible,

> more finely tuned "multifactor" approach in which no single factor is always dispositive whenever a defendant challenges the sufficiency of an alleged RICO pattern.[10]

The "multifactor" approach the lower courts are using to determine whether a RICO pattern exists was well stated by the court below in this case. The Sixth Circuit Court of Appeals wrote:

> Therefore, to state the inquiry simply, a pattern is the sum of various factors including: the length of time the racketeering activity existed; the number of different schemes (the more the better); the number of predicate acts within each scheme (the more the better); the variety of species of predicate acts (the more the better); the distinct types of injury (the more the better); the number of victims (the more the better); and the number of perpetrators (the less the better). Therefore, at one extreme is a perpetrator committing two predicate acts, in one day, in one scheme, causing a single injury, to a single victim. This is not a pattern. *See Sedima*, 473 U.S. at 496 n.14. At the other extreme, a perpetrator engineering dozens of schemes, and using myriad predicate acts to

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[10] David W. Gartenstein and Joseph F. Warganz, *RICO's "Pattern" Requirement: Void for Vagueness?*, 90 Columbia Law Review 489, 497 (1990).

> further each scheme, against numerous victims causing numerous types of injuries, beyond peradventure engages in a pattern of racketeering activity.

Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1110 (6th Cir. 1995).[11]

Other circuits have articulated and applied this same "multifactor" approach in similar language.[12] When the predicate crimes are related and continuous, the circuits are able to find a "pattern" by applying this "multifactor"

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[11] The Court of Appeals went on to detail the facts of this case relevant to the "pattern" determination. It concluded, "The only factor militating against a finding of a pattern is the fact that the number of victims is limited. But there is no per se rule that a weakness in one area is dispositive. Here the limited number of victims is more than balanced by the strength presented in other areas." 58 F.3d at 1111.

[12] *See, e.g., GICC Capital Corp. v. Technology Finance Group*, 67 F.3d 463, 467 (2nd Cir. 1995)(regarding continuity); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1264-65 (D.D.C. 1995); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543-44 (10th Cir. 1993)(regarding continuity); *Hindes v. Castle*, 937 F.2d 868, 873 (3rd Cir. 1991); *J.D. Marshall Int'l., Inc. v. Redstart, Inc.*, 935 F.2d 815, 820 (7th Cir. 1991); *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1411-13 (3rd Cir. 1991), *cert. denied*, 501 U.S. 1222 (1991); *Hartz v. Friedman*, 919 F.2d 469, 472 (7th Cir. 1990); *Banks v. Wolk*, 918 F.2d 418, 423 (3rd Cir. 1990); *Olive Can Co., Inc. v. Martin*, 906 F.2d 1147, 1151 (7th Cir. 1990)("multifactor test for continuity"); *Parcoil Corp. v. Nowsco Well Service, Ltd.*, 887 F.2d 502, 504 (4th Cir. 1989); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3rd Cir. 1989); and *Sutherland v. O'Malley*, 882 F.2d 1196, 1204-05 (7th Cir. 1989).

approach.[13] Similarly, when the crimes are not related or the time period is very short, the circuits find no "pattern."[14]

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[13] *See, e.g., Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995); *U.S. v. Khan*, 53 F.3d 507 (2nd Cir. 1995), *cert. denied*, 1196 U.S. LEXIS 18 (1996); *U.S. v. Bustamante*, 45 F.3d 933, 941 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 473 (1995); *Aetna Casualty Sur. Co. v. P & B Autobody*, 43 F.3d 1546 (1st Cir. 1994); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994); *Schroeder v. Acceleration Life Ins. Co.*, 972 F.2d 41 (3rd Cir. 1992); *U.S. v. Pelullo*, 964 F.2d 193, 209-210 (3rd Cir. 1992)(collecting cases); *Diamonds Plus, Inc., v. Kolber*, 960 F.2d 765, 769 (8th Cir. 1992); *U.S. v. Church*, 955 F.2d 688 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 233 (1992); *Abell v. Potomac Ins. Co.*, 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992); *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991)(3 forgeries over 13 months plus threat of continued misconduct); *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1304 (8th Cir. 1991); *U.S. v. Ruiz*, 905 F.2d 499 (1st Cir. 1990); *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (1st Cir. 1990); *Combs v. Bakker*, 886 F.2d 673 (4th Cir. 1989); *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989); and *Jacobson v. Cooper*, 882 F.2d 717 (2nd Cir. 1989).

[14] *Thornton v. First State Bank*, 4 F.3d 650 (8th Cir. 1993); *Primary Care Inv., Seven v. PHP Healthcare*, 986 F.2d 1208 (8th Cir. 1993); *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134 (5th Cir. 1992); *Religious Technology Center v. Wollersheim*, 971 F.2d 364 (9th Cir. 1992), *cert. denied*, 479 U.S. 1103 (1987); *Apparel Art Int'l v. Jacobson*, 967 F.2d 720 (1st Cir. 1992); *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 99 (1992); *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587 (11th Cir. 1992), *cert. denied*, 116 S.Ct. 565 (1995); *Thompson v. Paasche*, 950 F.2d 306 (6th Cir. 1991); *Lange v. Hocker*, 940 F.2d 359 (8th Cir. 1991); *Pyramid Secur. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114 (D.D.C. 1991), *cert. denied*, 502 U.S. 822 (1991); *American Eagle Credit Corp. v. Gaskins*, 920 F.2d 352 (6th Cir. 1990); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593 (3rd Cir. 1990); and *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989).

Since *H.J. Inc.*, the district courts have been able to determine whether particular facts constitute a "pattern" in literally hundreds of reported cases.[15]

As *H.J.* points out, shortness of time is of a factor in connection with "closed-ended" continuity, but is not a factor in cases involving "open-ended" continuity.

[15] Recent district court cases finding a "pattern" include: *Fried v. Sungard Recovery Services*, 900 F. Supp. 758 (E.D. Pa. 1995); *Brook v. Schlesinger*, 898 F. Supp. 1076 (S.D.N.Y. 1995); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365 (D. Haw. 1995); *D'Orange v. Feely*, 894 F. Supp. 159 (S.D.N.Y. 1995); *Water Int'l Network, Inc. v. East*, 892 F. Supp. 1477 (M.D. Fla. 1995); *Trustee of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134 (S.D.N.Y. 1995); *Lavian v. Haghnazari*, 884 F. Supp. 670 (E.D.N.Y. 1995); *Arenson v. Whitehall Convalescent & Nursing Home*, 880 F. Supp. 1202 (N.D. Ill. 1995); *Rohland v. Syn-Fuel Associates--1982 Ltd. Partnership*, 879 F. Supp. 322 (S.D.N.Y. 1995); *Lemelson v. Wang Lab.*, 874 F. Supp. 430 (D. Mass. 1994); *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069 (S.D. Ohio 1994); *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076 (S.D.N.Y. 1994); and *Corparacion Insular de Seguros v. Munoz*, 849 F. Supp. 126 (D.P.R. 1994).

Recent district court cases finding no "pattern" include: *Gruntal & Co., Inc. v. San Diego Bancorp*, 901 F. Supp. 607 (S.D.N.Y. 1995); *Davis v. Hudgins*, 896 F. Supp. 561 (E.D. Va. 1995); *Trustees of the Plumber & Pipefitter Nat'l Pension Fund v. De-Con Mechanical Contractors*, 896 F. Supp. 342 (S.D.N.Y. 1995); *Thai Airways Int'l v. United Aviation Leasing B.V.*, 891 F. Supp. 113 (S.D.N.Y. 1994), *aff'd*, 59 F.3d 20 (1995); *Wobble Light v. McLain/Smigiel Partnership*, 890 F. Supp. 721 (N.D. Ill. 1995); *Bonton v. Archer Chrysler Plymouth*, 889 F. Supp. 995 (S.D. Tex. 1995); *Food Lion v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D. N.C. 1995); *Rini v. Zwirn*, 886 F. Supp. 270 (E.D.N.Y. 1995); *DeWit v. Firstar Corp.*, 879 F. Supp. 947 (N.D. Iowa 1995); *Pemberton Sales & Services v. Banco Popular de P. R.*, 877 F. Supp. 961 (D.V.I. 1994); *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986 (E.D.N.Y. 1995); *Bowdoin Constr. Corp. v. Rhode Island Hosp. Trust Nat'l Bank*, 869 F. Supp. 1004 (D. Mass. 1994); *Trans*

That the lower courts have been successfully determining whether a "pattern" exists in the cases since *H.J. Inc.* demonstrates that the requirement is not vague. As former Judge Getzendanner of the Northern District of Illinois, who has written many RICO opinions, stated, "After analyzing pattern in a number of cases, I found identifying patterns a relatively easy, low-risk task."[16]

This record proves the RICO "pattern" requirement is understood by the lower courts. It is not vague. This Court need not consider this challenge.

This entire matter of vagueness challenges to the pattern requirement of RICO was summarized by Professor Joseph Bauerschmidt:

> The void-for-vagueness doctrine has been well developed in its attendant sixty years of use by the Supreme Court. Statutes with independent scienter requirements are never vague. Federal statutes are rarely vague. Civil statutes which do not impinge upon the first amendment are almost never vague. For the Supreme Court to violate all

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World Airline, Inc. v. Berger, 864 F. Supp. 106 (E.D. Mo. 1994); *Gotham Print, Inc. v. American Speedy Print Ctrs., Inc.*, 863 F. Supp. 447 (E.D. Mich. 1994); and *Harris Custom Builders Inc. v. Hoffmeyer*, 834 F. Supp. 256 (N.D. Ill. 1993).

[16] Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 Vand. L. Rev. 673, 677 (1990).

these contours of the void-for-vagueness doctrine would be unprincipled, indeed, nothing less than *"Cheatin' yourself at solitaire."*[17]

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[17] Bauerschmidt, *"Mother of Mercy - Is This The End of RICO?" - Justice Scalia Invites Constitutional Void-for Vagueness Challenge to RICO "Pattern"*, 65 Notre Dame Law Review 1106, 1124 (1990).

II.

THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT IN THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §1962(c), MEETS THE DUE PROCESS REQUIREMENT OF NOTICE WHEN APPLIED TO PETITIONERS WHO COMMITTED HUNDREDS OF COUNTS OF MAIL FRAUD, 28 COUNTS OF WIRE FRAUD AND ONE COUNT OF TRAVEL ACT FRAUD OVER A PERIOD OF AT LEAST 12 YEARS.

Petitioners claim the "pattern of racketeering activity" element of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(c) as applied to their conduct described in the Amended Complaint violates their substantive due process rights guaranteed by Amendments V and XIV to the United States Constitution. They assert the pattern element is not sufficiently well defined to put them on reasonable notice that the conduct detailed in the Amended Complaint was prohibited.

In their first argument, Petitioners resurrect the thoroughly discredited claim that RICO should be limited to traditional organized crime or its equivalent.[18] They try to contrast their breaches of contract against the murder, gambling and drug trafficking associated with organized

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[18] *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236-37, 243 (1989); and *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). *See also, Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 390-91, 395 n.14, 399 (7th Cir. 1985), *aff'd*, 473 U.S. 606 (1985).

crime. They ignore the charges of hundreds of instances of criminal fraud in the Amended Complaint. They disregard the holdings in *H.J. Inc.* and *Sedima* that RICO applies to both legitimate and illegitimate enterprises.[19]

In their second argument, Petitioners claim this case presents the constitutional challenge envisioned by Justice Scalia in *H.J. Inc.* Because due process vagueness challenges are considered on an "as applied" basis,[20] Petitioners portray themselves as the diminutive David suffering undeserved punishment from a competitive Goliath.[21] Throughout their Brief, Petitioners claim they are not racketeers and their actions are not crimes. They seek a mantle of innocence in order to claim they could not have known RICO might apply to their activities.[22]

Actually, the Amended Complaint charges the Petitioners with hundreds of counts of mail fraud, 28 counts

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[19] *See also, U.S. v. Turkette*, 452 U.S. 576 (1981).

[20] *See, New York v. Ferber*, 458 U.S. 747, 767-79 (1982) and *United States v. Pungitore*, 910 F.2d 1084 (3rd Cir. 1990), *cert. denied*, 500 U.S. 915 (1991).

[21] Petitioners' Brief, p. 9.

[22] Petitioners start minimizing in the Questions Presented where they claim this is "a commercial civil lawsuit premised on common law fraud" instead of admitting the actual allegations of the Amended Complaint charging hundreds of racketeering crimes. Petitioners' Brief, p. ii. This pattern of minimizing their crimes continues. Petitioners' Brief, pp. 7, 9, 16, and 17.

of wire fraud and one count of Travel Act fraud.[23] All of these crimes were directed to the perpetration of various schemes to steal oil and gas leases, royalties and production income from the Respondents. Petitioners are anything but innocent. They have engaged in a long, continuous spree of related crimes. Their fall to RICO's "slingshot" is surprising only because they did not expect to be caught.

This is not the constitutional challenge envisioned by Justice Scalia. In that case, it will be difficult to determine whether the charges constitute a "pattern of racketeering activity." This is not such a case. There are too many related predicate acts supporting too many schemes over too long a time period for there to be any question whether these facts constitute a "pattern of racketeering activity."

Petitioners are not innocents caught in a web of vagueness. According to the Amended Complaint, they engaged in exactly the kind of unsavory business RICO was designed to eradicate. These hundreds of crimes were related by similarity and lasted more than 12 years. This is a RICO "pattern" without any doubt.

The circuit court answered the Petitioners' complaint that they could not know their conduct might be a "pattern of racketeering activity." The court wrote:

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[23] These allegations must be taken as true because the district court granted a Rule 12(b)(6) motion to dismiss. *Conley v. Gibson*, 355 U.S. 41 (1957).

> If one can take the time to avoid committing mail fraud or wire fraud, or extortion, or murder, or any of the other enumerated predicate offenses, all of which are federal or state criminal offenses in their own right, then one can sleep safe in the knowledge that he will not be found to have violated RICO.
>
> The issue, bluntly and simply framed, is whether a person of ordinary intelligence would know that committing dozens if not hundreds of acts of wire and mail fraud, over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity. Since, by its terms it only takes a minimum of two acts, it is simply implausible for a party to claim that it was not aware that committing numerous predicate acts would expose it to potential RICO liability.[24]

The Petitioners do not claim the mail fraud, wire fraud or Travel Act fraud statutes are vague because that issue is settled.[25] Therefore, they clearly knew or could

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[24] 58 F.3d 1101, 1108-09.

[25] *See, e.g., U.S. v. Conner*, 752 F.2d 566 (11th Cir. 1985), *cert. denied*, 474 U.S. 821 (1985); *U.S. v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980), *cert. denied*, 447 U.S. 928 (1980); *U.S. v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1978); *U.S. v. Feinberg*, 535 F.2d 1004 (7th Cir. 1976), *cert. denied*, 429 U.S. 929 (1976); *Roberts v. U.S.*, 226 F.2d 464 (6th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956); and *U.S. v. Riggs*, 743 F. Supp. 556 (N.D. Ill. 1990).

have known they were engaging in criminal conduct each of the multiple times they violated these statutes. Innocent business persons they are not. They have been regularly violating three constitutionally specific statutes for more than twelve years. They mislead the Court with their claims of innocence.

Petitioners ignore the fact they crossed the bright line between the legal and the criminal each time they violated a statute prohibiting a RICO predicate act. Their argument ignores their guilt of multiple predicate acts because the predicate acts do warn the wary. Petitioners want this Court to forget the fact they crossed this initial bright line literally hundreds of times.

RICO provides a second bright line warning of potential RICO liability in its definition of a "pattern of racketeering activity." Essentially, 18 U.S.C. § 1961(5) provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, ... within ten years ...."

Therefore, anyone seeking to avoid conducting a "pattern of racketeering activity" need only avoid committing two predicate acts within ten years of each other. By this simple expedient, anyone can know they have not crossed into the realm of RICO liability. Each successive crime by Petitioners crossed this second bright line warning of potential RICO liability.

While the commission of the second predicate act may not make a pattern, it is certainly a second warning that

increased liability may attach. Petitioners do not deny the brilliance of either of these lines.

Thus, there are two bright lines between the legal and the "pattern of racketeering activity" required as an element of RICO liability: 1) commission of one predicate act; and 2) commission of a second predicate act within ten years.

The vagueness claim advanced by Petitioners is that after committing two predicate crimes within ten years, there is no mathematical certainty how many additional crimes will be required to create a "pattern of racketeering activity."

They fail to explain what authority grants them a constitutional right to a third warning of their criminality after crossing two irrefutably bright lines into the illegal.

Petitioners claim this Court's interpretation of the "pattern" requirement is vague.[26] In *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985) and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) this Court held "pattern" required a showing of continuity plus relationship among the predicate acts which combine to produce a pattern. While Justice Scalia is correct that this definition is not mathematically precise, it is an adequate standard to pass due process muster.

Due process does not require the specificity of a mathematical formula. All the Constitution requires is a

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[26] See Petitioners' Second Question Presented.

reasonably understandable standard. As this Court said in *Grayned v. City of Rockford*, 408 U.S. 102, 110 (1972):

> Condemned to the use of words, we can never expect mathematical certainty from our language.

Due process requires a standard. "Pattern of racketeering activity" as defined by this Court is undeniably a standard. It clearly counsels anyone engaged in repeated commission of RICO predicate crimes that they risk passing from the just criminal into the realm of RICO liability.

The "pattern of racketeering activity" is the third threshold for RICO liability. The first is the commission of one predicate crime. The second is the commission of a second predicate crime within a decade. Not even the Petitioners are able to claim these first two thresholds are vague. They only complain of the third threshold. Yet this third threshold is well within the bounds of constitutional clarity.

In *Hoffman Estate. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982) this Court stated, "The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)." There this Court noted the two considerations in vagueness analysis are fair notice and fair enforcement. "Economic regulation is subject to a less strict vagueness test...." There is also greater tolerance for "enactments with civil rather than criminal penalties because the consequences of imprecision are less severe."

This Court has also noted "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Chapman v. United States*, 500 U.S. 453, 464 (1991).

This is especially true of civil statutes: "To invalidate a civil statute, a reviewing court must find that 'no standard of conduct is specified at all.'" *Medical Soc. of N.Y. v. Cuomo*, 777 F. Supp. 1157, 1165 (S.D. N.Y. 1991), *aff'd*, 976 F.2d 812 (2nd Cir. 1992), quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

In fact, there was no standard of any kind in *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966), considering a Pennsylvania statute authorizing a jury to determine whether an acquitted criminal defendant should pay the costs of prosecution. This Court found this statute void for vagueness because it "left ... jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

The "pattern requirement" of RICO does provide a comprehensible standard. This is best demonstrated by the hundreds of lower court cases actually applying the standard.[27] The lower courts are not having unreasonable difficulty determining which configurations of facts constitute a "pattern" and which do not.

Petitioners supply no contrary analysis. They claim, "The Courts of Appeals are now struggling with determining

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[27] *See* footnotes 12, 13, 14 and 15 *supra*.

pattern...."[28] But their only support for this claim is a list of cases where the circuits have readily applied the "pattern of racketeering activity" standard. In each case, there is an analysis of the facts to determine whether the predicate acts amount to a "pattern." There is no evidence of a struggle.

"Pattern of racketeering activity" is like many other phrases in the law that lack mathematical precision but set a constitutionally permissible standard. Other phrases this Court has approved include: "restraint of trade,"[29] "an active part in management of political campaigns,"[30] "conduct unbecoming an officer and a gentleman,"[31] and "crimes against nature."[32]

The RICO "pattern" requirement is no more difficult than any of these phrases. There is no need for further consideration of this matter by this Court.

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[28] Petitioners' Brief p. 23.

[29] *Nash v. U.S.*, 229 U.S. 373 (1913).

[30] *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973).

[31] *Parker v. Levy*, 417 U.S. 733 (1974).

[32] *Rose v. Locke*, 423 U.S. 48 (1975).

III.

THE CONFUSING THIRD QUESTION PRESENTED SHOULD BE DISMISSED BECAUSE IT WAS NOT RAISED IN EITHER THE DISTRICT OR CIRCUIT COURTS AND BECAUSE IT IS FORECLOSED BY PRECEDENT.

A. New Arguments Are Prohibited On Appeal

Petitioners' Third Question Presented should be rejected because it is new to this litigation. That it was not argued or considered below is demonstrated by the Petitioners' Statement of the Case. Their Course of Proceedings describes no consideration of this issue by the lower courts.[33]

It is axiomatic that this Court will not hear arguments raised for the first time on appeal. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 n.2 (1989); and *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987).

The Court has said, "Our normal practice... is to refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

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[33] Petitioners' Brief, p. 4 - 5.

Petitioners' third argument is entirely new to this case. Below, Petitioners' argued RICO is void for vagueness. They never examined the relation between the "enterprise" and "pattern" elements of RICO. *See Haroco v. American Nat. B. & T. Co. of Chicago*, 473 U.S. 606, 608 (1985) (refusing to "consider petitioners' late-blooming argument that the complaint failed to allege a violation of § 1962(c)").

This Court should decline review of this question because it is new to this case.

B. The Apparent Argument

According to Petitioners, RICO's pattern clause requires "a RICO defendant's predicate acts [to] amount to conduct (direction) of the alleged enterprise's affairs and not just the defendant's own business affairs."[34]

Petitioners claim a defendant's business affairs cannot be actionable predicates. The individual components of their argument *require* an enterprise to have a business life that includes acts distinct from the predicates forming a pattern; *require* a distinction between the business affairs of a defendant and an enterprise; and *require* an "enterprise" to consist of persons different from the defendants named in a complaint. There is no authority for such requirements.

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[34] Petitioners' Brief, p. 25.

C. Turkette Has Settled This Issue

Even if Petitioners adequately preserved their third argument for review, the Court should deny certiorari because the issue raised was foreclosed by *United States v. Turkette*, 452 U.S. 576 (1981).

Petitioners' argument ignores enterprises formed to pursue only illegal ends with members who do nothing but advance the enterprise's illicit interests. In a such a setting, a defendant would be a full-time wrongdoer totally devoted to the enterprise's nefarious ends. This would obviate any difference between a defendant's affairs and those of the enterprise.

Yet under Petitioners' view, such persons would be immunized because they did not pursue acts distinct from the racketeering that was the enterprise's *raison d'être*. Further, in such an enterprise, all its members are wrongdoers and *should* be exposed to liability. There is no rational or statutory basis to distinguish between members of such an enterprise and the persons exposed to liability.

Turkette long ago settled these issues in Respondents' favor. *Turkette* established that RICO applies to "legitimate" *and* wholly "illegitimate" enterprises. *Turkette*, 452 U.S. at 585 ("There is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises"). RICO accepts that "an enterprise may be organized solely for illegitimate purposes." *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985), citing *Turkette*. Further, there is no need for

members of a RICO enterprise to pursue acts other than the racketeering affairs of an enterprise.

There is no need to review Petitioners' third argument. It treads on worn ground.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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